PUBLIC BANK BHD.

v.

KANGSAR PROPERTIES SDN. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 23-51-86]
15 SEPTEMBER 1987

CIVIL PROCEDURE: *Default Judgement under O. 83 r. 4 of the Rules of the High Court - Application to set aside - Was previous judgment on which the current judgment based irregular - Order 42 r. 11 - In such previous irregularity a ground to have present judgment set aside - Waiver - Can judgment under O. 83 r. 4 be sought be summons.*

The plaintiff, (the bank), sued and obtained judgment (previous judgment) against the 2nd defendant in respect of money lent to a customer which had been secured by a charge over certain land of which the 2nd defendant was the chargee. The charged land was sold and the proceeds set off against the debt. However a balance of RM102,373.19 remained. The 2nd defendant was then sued on her personal convenant contained in the charge document to pay the difference, interest and costs. Default judgment was entered against the 2nd defendant. The 2nd defendant has now applied to set aside this default judgment entered under O. 83, r. 4 of the Rules of the High Court.

Held:

[1] Order 83 would allow a chargee to claim in an action begun by writ, payment of money secured by a charge.

[2] There was no difference in fact between the draft judgment and the judgment. Neither the staff nor Registrar had altered the draft judgment.

[3] Although there seemed to be an error in the previous judgment in that at the time it was entered the Court could not order interest in excess of 8% p.a. (which may not be the position today under O. 42 r. 11 as amended) as they had in fact done, this should not initiate the present judgment sought to be set aside, although the present judgment may be based on the previous judgment, as:

(a) When the present judgment was given the previous judgment remained valid as it had not been set aside or amended.

(b) The defendant had without cause absented herself from the O. 43 r. 4 application and offered no explanation, part of the previous judgment had been carried out without complaint from the 2nd defendant and would amount to a waiver of the irregularity and the delay in raising the point of interest until this late stage, thus bordering on an abuse of process.

(c) To allow the application would erode the concept of "finality of a judgment until set aside,"

(d) Apart from this irregularity no substantial question on merits that require trial was established.

[Application dismissed.]

Cases referred to:
Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] CLJ (Rep) 349
Huges v. Justin [1894] 1 QBD 667

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 11, O. 83 rr. 1(1)(a), 4

For the plaintiff - Yap Foo Ken; M/s. Choong Yik Son & Robiha
For the defendants - C. Wilfred; M/s. C. Wilfred & Co.

JUDGMENT

Peh Swee Chin J:

The 2nd defendant applied to set aside a judgment in default of appearance on the hearing of an application for summary judgment under O. 83 r. 4, (but not under O. 14), of the Rules of High Court.

The plaintiff, (the bank), sued the 2nd defendant for money lent to a customer, such money lent being secured by a charge over a certain land of which the 2nd defendant was the chargee and the bank, the chargor.

The charged land was sold under an order of Court in a charge action and the proceeds of sale realised amounted to RM74,082.94 which was applied by the bank towards payment of money owing by the said customer, leaving a final balance of RM102,373.19.

The 2nd defendant was sued, *inter alia,* on her personal convenant contained in the charge documents to pay the difference between the amount owing by the said customer and amount of proceeds of sale realised from the said sale under an order of Court in the said charge action in the event of such proceeds of sale proving insufficient.

In a summons dated 20 August 1986 and taken out for leave to enter judgment under O. 83 r. 4 of the Rules of High Court, the bank sought judgment, on the ground of the said personal covenant, for the balance sum of RM102,373.12 "as at 21 July 1986" and "interest accruing thereon at 14.5% p.a. and costs of RM225." It is pertinent to point out that the interest at 14.5% aforesaid was not stated to be for any particular period commencing from 22 July 1986 in the summons, and interest at 14.5% p.a. was claimed and quantified up to 21 July 1986, and to repeat, the summons was dated 20 August 1986.

This summons, (encl. 13), came up for hearing before another learned Judge at Ipoh and from the minutes on the file, an order in terms was made, when the 2nd defendant was absent on 24 November 1986.

In subsequent summons, (encl. 27), taken out by the 2nd defendant for the order or judgment entered on 24 November 1986 to be set aside and for leave to file her defence, it came up before me.

Before me, several points were taken on her behalf by her learned Counsel.

The first point was that judgment should not have been sought by summons under O. 83 r. 4, judgment, instead, should have been entered straight away. Ordinarily, to put the 2nd defendant on notice would be more advantageous to the 2nd defendant than just entering up judgment without further notice; the point was really further notice; the point was really academic, but it ought to be dealt with.

In my judgment, O. 83 would also allow a chargee to claim in an action begun by writ, payment of money secured by the charge. The wording of O. 83 r. 1(1)(a) is specific to that precise effect. The point had no merit at all.

The next point taken was rather mystifying. It was submitted that the judgment against the 2nd defendant as extracted showed interest at 8% p.a. from date of judgment to date of satisfaction. It was then submitted that the relevant draft judgment, (before its perfection), sent by the bank's solicitors, showed the rate of interest to be 14.5% p.a. to date of satisfaction and staff or the learned Registrar had altered the said draft judgment by altering the rate of interest from "14.5% p.a. to date of satisfaction" to "8% p.a. to date of judgment to date of satisfaction". The judgment as extracted was therefore wrong as the learned Registrar or Registry clerk in question had no power to "change a Judge's order."

On looking at the draft judgment referred to, no such alteration was found, and a copy of such draft judgment is annexed hereto and marked as appendix "A". There must have been some mix-up on the part of 2nd defendant and the point taken was wholly without substance.

The next point was that the judgment, (hereinafter called the previous judgment), given in the previous charge action in which an order of sale of the charged land was granted offended the *ratio decidendi* of *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] CLJ (Rep) 349, and the judgment, (hereinafter called the present judgment), obtained in this civil suit was therefore irregular.

The said *Supreme Finance* case decided to the effect that O. 42 r. 11 of the Rules of the High Court would only allow a maximum rate of interest at 8% p.a. on a judgment sum whatever the contractual rate of interest might be agreed between the parties. Since the judgment given in the previous judgment provided for interest at 14.5% p.a. until the date of satisfaction, it was submitted that the previous judgment was wrong. It was submitted, I believe, that since the present judgment before me and sought to be set aside was based on that previous judgment it was also wrong. It may be of interest to note that to overcome the *ratio* in *Supreme Finance* case presumably, O. 42 r. 11 was amended on 29 October 1986, (*vide* P.U. (U) 445/86), to allow agreed contractual rate of interest other than 8% p.a. to be paid until date of satisfaction of judgment. This amendment took place, it will be observed, long after the present judgment and the previous judgment were entered.

In the first place, the argument of learned Counsel would have been wellfounded if the judgment that was sought to have set aside before me was the previous judgment, (and not the present judgment), on the ground that the previous judgment was entered for too much, please see *Hughes v. Justin* [1894] 1 QBD 667.

However, it was the present judgment that was sought to have set aside. It was entered, in all respects, regularly, though it was based, on the previous judgment. When the present judgment was given, the previous judgment still and remained a binding judgment, a binding command of the learned Judge who gave it. It was binding because, it had not been set aside or amended in any manner as to the rate of interest complained of. It would have been valid equally for all purposes of execution and there could not have been any conceivable valid claim for wrongful attachment. In fact part of the previous judgment as concerns the order of sale of the charged land was in fact carried out without any complaint from any quarter.

Secondly I took into consideration, (in exercising my discretion in regard to the present application to set aside the present judgment), the following factors, viz. the total failure of 2nd defendant to offer any explanation for her absence before the learned Judge on the

hearing of O. 83 r. 4 application, such total failure would seem to be that that by wilful absence, the present judgment was allowed to go in default; approbation of the previous judgment or waiver of the irregularity of the previous judgment, the delay in raising this point of interest until now, thus bordering on an abuse of process.

Thirdly, to allow the 2nd defendant to found his present application to set aside the present judgment on the ground of irregularity in the previous judgment would be to create a most unjust and undesirable precedent, in the circumstances of this case, for if 2nd defendant were allowed to expect the Court to take judicial notice of an irregularity of a perfected previous judgment which had never been set aside or amended in any way on any application from the 2nd defendant who chose to do nothing about it, a judgment of the Court would suffer from the serious lack of finality which it is supposed to have as its most precious attribute. Further, for the same reasons given by the 2nd defendant, 2nd defendant should be allowed to refer to an even earlier judgment previous to the said previous judgment if there was such an even earlier judgment, when litigation would then seem to go on *ad nausesum*, contrary to the public policy against it.

Fourthly, apart from the uncorrected irregularity of the previous judgment which I have just dealt with, the 2nd defendant had not elsewhere established a defence on the merits or triable issue, or any substantial question for trial.

All things considered, the Court exercised its directive in dismissing the application of the 2nd defendant in the circumstances.

Appendix 'A'

JUDGMENT

Upon The Application of the plaintiff abovenamed And Upon Reading the summons-in-chambers dated 20 August 1986 (encl. 13), the affidavit of Choo Keng Lun affirmed on 18 August 1986 (encl. 12) and the pleadings filed herein And Upon Hearing Mr Yap Foo Ken of Counsel for the plaintiff and in the absence of the 2nd defendant albeit duly served.

It Is Hereby Ordered Pursuant To O. 83 r. 4 Of The Rules Of The High Court 1980 that leave be and is hereby granted to the plaintiff to enter judgment in default of appearance against the 2nd defendant abovenamed And It Is This Day Adjudged that the 2nd defendant do pay the plaintiff the sum of RM102,373.19 as at 21 July 1986, interest on monthly rests accuring thereon at the contractual rate of 14.5% per annum from 22 July 1986 to the date hereof and thereafter interest on the principal sum and interest adjudged hereon at 8% per annum from 25 November 1986 to full satisfaction and costs of RM225.

Also found at [1988] 2 CLJ 244